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No. 99-1399

In the

Supreme Court of the United States

BONNIE BRIAR SYNDICATE, INC.,
Petitioner,

v.

THE TOWN OF MAMARONECK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeals, State of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Can a town constitutionally solve preexisting general municipal drainage and flooding problems (and satisfy desires for open space) by zoning one property owner's land to be a de facto catch basin for waters diverted from elsewhere in the town? Does that take the affected owner's property for public use without compensation by singling out the aggrieved landowner alone to bear community-wide burdens?

2. This Court has held that a Fifth Amendment taking of property occurs when a land use regulation "fails to substantially advance legitimate state interests." What legal criteria determine whether such a regulation passes or fails that test? Specifically, is regulation that "substantially advance[s] legitimate state interest" synonymous with that which is merely "reasonable," as the court below held?

3. Can a municipality destroy a property owner's constitutionally protected "distinct investment-backed expectations" for using land simply by asserting that there is a *reasonable* relationship between its regulatory destruction of those expectations and its ostensible goal, where evidence would show that such destruction is not *necessary* to achieve the goal?

4. Can a land use regulation be declared valid *as a matter of law*, thus depriving the property owner of the right to a trial on the merits, when disputed facts underlie the municipality's assertion of a constitutionally valid connection between the regulation's means and its ostensible ends?

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari.[1] Written consent for amicus participation in this case was granted by counsel of record for Petitioner Bonnie Briar Syndicate, Inc. Consent was withheld by Respondent Town of Mamaroneck, *et al.*

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by government regulation of private property.

Attorneys for Pacific Legal Foundation have represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 564 U.S. 687, 119 S. Ct. 1624 (1999). Pacific Legal Foundation attorneys are also currently representing Claude and Micheline Lambert in a petition for certiorari before this

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Court in *Lambert v. City and County of San Francisco*, Supreme Court Docket No. 99-697, another case in which an appellate court denied a property owner relief for a regulatory taking. Because of the Foundation's experience in the field of regulatory takings, it can add a unique perspective that will assist this Court's consideration of this case.

PLF seeks to augment the arguments of Petitioner by providing additional information regarding the split of authority among the lower courts on the issues presented by this case. PLF believes its public policy perspective and litigation experience dealing with the issues involved will provide a unique viewpoint on the issues presented in this case. PLF believes this viewpoint will aid this Court in evaluating the merits of the Petition.

For the reasons stated above, Amicus respectfully requests that this Court GRANT Amicus' motion for leave to file this brief.

DATED: March, 2000.

Respectfully submitted,

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STATEMENT OF THE CASE

When Bonnie Briar Syndicate, Inc. (Petitioner), decided to build homes on land that had been residentially zoned for 73 years, the Town of Mamaroneck (Respondent) suddenly decided that the land would be more valuable to the community as recreational open space and as a stormwater catchment basin. This case raises the question of what level of constitutional scrutiny should be applied to a zoning ordinance which strips a property owner of its right to develop ***any*** of its property.

Bonnie Briar Syndicate, Inc., owns 150 acres of land in the Town of Mamaroneck. Since 1921 this property has been used as a golf course. From 1921 until 1994 the property was zoned for residential use, allowing for homes on lots of 15,000 and 30,000 square feet. In 1994, the Town Board rezoned the property for exclusive recreational use, stripping the Petitioner of its ability to construct any homes on the 150 acre parcel.

Months before the rezoning occurred, Petitioner submitted a Preliminary Subdivision Plan to the Town Board. This plan contemplated the construction of 71 single-family homes, leaving 112 acres for the 18-hole golf course. The Board rejected this plan and rezoned the property for exclusive recreational use. The Board did so in order to achieve three separate goals. First, denying the Petitioner the ability to build any homes on the 150 acre lot would preserve open space. Second, this restriction would provide recreational opportunities.[1] Third, the restriction would mitigate flooding of coastal and flood plain areas.

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[1] The development proposed by Petitioner contemplated the construction of 71 residential homes, leaving 112 acres of open space on the existing 18-hole golf course site. The court below makes no attempt to explain how the construction of homes near the golf course would somehow diminish recreational opportunities.

Petitioner filed suit alleging that the Town's rezoning of its property constituted a regulatory taking of private property without just compensation. The Supreme Court and the Appellate Division rejected this claim. The Court of Appeals of New York was then called upon to address the issue of the appropriate standard of review to be applied in a regulatory takings case which does not require a dedication of land.

Relying on this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624 (1999), the Court of Appeals held that the "rough proportionality" test of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), was inapplicable in cases where the landowner's challenge is not based on excessive exactions, but on the denial of development. *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96, 107, 699 N.Y.S.2d 721, 725 (1999). The court further held that the "essential nexus" test set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), was also inapplicable outside the context of challenges to governmental regulations or actions where a dedication of property is demanded in exchange for the right to develop. *Briar*, 94 N.Y.2d at 107, 699 N.Y.S.2d at 725. After shunning both the "rough proportionality" test and the "essential nexus" test, the court applied the "reasonable relation" standard to the Town's restriction on Petitioner's ability to develop the parcel. The court concluded that zoning the property for solely recreational use bore a reasonable relation to the government's interest in preserving open space, preserving recreational activities, and flood control. *Id.* at 108, 699 N.Y.S.2d at 726.

REASONS FOR GRANTING THE WRIT

SUMMARY AND INTRODUCTION

The Town of Mamaroneck decided that sterilizing the development rights of Bonnie Briar Syndicate's property would serve the City's goals of having lots of open space,

land for recreation, and even a natural basin for stormwater overflow. But is the mere recitation of public goals that will allegedly be advanced by a severe restriction on property enough to insulate a town from *meaningful* scrutiny under the Takings Clause? This Court should grant the Petition for Writ of Certiorari in order to elucidate the proper standard of review to be applied in a regulatory takings case which does not involve dedications or exactions. In the last two decades this Court's regulatory takings jurisprudence has evolved at an accelerated rate. Although this Court's recent jurisprudence has demystified much of this area of the law, lower courts continue to struggle with the standard of review to be applied in cases which do not involve dedications or exactions. In fact, last term this Court explicitly recognized that this issue had not yet received a "thorough explanation." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. at 1636.

The absence of a "thorough explanation" has created a nationwide patchwork of inconsistent lower court decisions. As lower courts continue to grapple with this issue, the split of authority among these courts is exacerbated. The case at bar represents the latest attempt by a court to determine the appropriate standard of review to be applied in a regulatory takings challenge to a restriction on the use of private property that does not involve a governmental demand of a dedication or exaction. The court below read this Court's precedent as requiring it to eschew both the rough proportionality and the essential nexus tests and to apply a standard of review akin to rational basis to all takings cases which do not involve a dedication or exaction. Although this holding is at odds with this Court's jurisprudence (*see Agins v. City of Tiburon*, 447 U.S. 255 (1980), and *Yee v. City of Escondido*, 503 U.S. 519 (1992)), this erroneous interpretation of the Takings Clause is not unique. Other lower courts have required governmental encroachments

upon Fifth Amendment rights to survive a more rigorous level of scrutiny, even outside the context of dedications and exactions. This Court should grant the Petition for Writ of Certiorari in order to a provide a "thorough explanation" of the proper standard of review and give much needed guidance to the lower courts on this important question of constitutional law.

I

THIS COURT SHOULD GRANT THE WRIT TO REINFORCE THE PROPER STANDARD OF REVIEW FOR TAKINGS CASES

The New York Court of Appeals has decided that the Fifth Amendment to the United States Constitution requires only that a governmental decision to deny a property owner the right to develop land, thereby restricting it to recreational use, bear a "reasonable relation" to the government's stated objective. *Bonnie Briar*, 94 N.Y.2d at 108, 699 N.Y.S.2d at 726. This important question of federal constitutional law has generated a great deal of confusion among the lower courts. Although this Court has articulated a standard of heightened scrutiny to be applied by lower courts when evaluating whether the Fifth Amendment is violated, lower courts nonetheless remain perplexed as to how to apply that standard or, as in this case, whether to apply it at all.

A. This Court's Regulatory Takings Jurisprudence Provides Standards for Determining the Constitutionality of Land Use Regulations

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This Court has long recognized that a regulation which interferes with the rights of property owners can effect a taking if that regulation goes "too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that

while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). Justice Holmes' statement of the "general rule" has been identified as the "genesis of the so-called regulatory takings doctrine." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)).

In *Agins v. City of Tiburon*, 447 U.S. 255, this Court provided an analytical framework for determining whether a regulation had gone too far. As this Court explained, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted).

The "substantial advancement" prong of this test was revisited and further refined by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825. *Nollan* involved a challenge to the government conditioning the granting of a building permit on the property owners' willingness to grant a public easement across their property. *Nollan*, 483 U.S. at 828. This Court explained that such regulations could not weather constitutional attack by merely referencing a "rational relationship" to the asserted objectives:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary . . . [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (citations omitted; emphasis in original). Thus, the regulatory decision (whether a denial or a grant of the permit subject to conditions) must bear an "essential nexus" to a legitimate state interest. *Id.* at 837.

Where *Agins* and *Nollan* involved the standard of review for regulatory decisions to deny or condition a permit, *Dolan v. City of Tigard*, 512 U.S. 374, established the standard for reviewing the *scope* of any conditions imposed. This Court ruled that the conditions imposed must be "roughly proportional" to the impact of the proposed development. *Id.* at 391.

Because both *Nollan* and *Dolan* involved regulations under which the local government had required the dedication of real property in exchange for the necessary development permits, lower courts (and some commentators) have erroneously conflated the analysis of the two cases. This has led some to argue that the two very different tests discussed in those decisions apply *only* in cases of permit conditions involving exactions. This has created much confusion in the lower courts.

B. This Court Should Grant Review in This Case to Reaffirm That Heightened Scrutiny Is the Proper Standard of Review to Determine Whether a Permit Denial Constitutes a Regulatory Taking

Lower courts have split over the question of whether the *Agins/Nollan* standard of heightened scrutiny should be applied outside the context of dedications. That *Nollan* applies beyond the context of cases requiring a dedication of land should not be a question. *Nollan's* footnote three, which dictates that heightened judicial scrutiny be employed in takings cases, is merely an explanation of the test first established by this Court in *Agins v. City of Tiburon*. *Agins*, of course, did not involve a dedication of land but was a

challenge to the city's zoning ordinances. *Agins*, 447 U.S. at 257. Despite the fact that the heightened scrutiny test was established in a case challenging zoning ordinances, lower courts have been reluctant (sometimes tenaciously so) to apply this test outside the context of dedications and exactions.[2]

Despite this Court's pronouncements in *Agins* and *Yee* regarding the scope of the substantial advancement test, lower courts have expressed confusion over this area of the law. As the United States District Court for the District of Nevada recently explained in a case challenging a series of ordinances which severely restrict (and often prohibit) the development of certain parcels in the Lake Tahoe Basin, "there is as yet no clear test for determining whether a regulation substantially advances a legitimate state interest–at least in the type of situation involved here." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 34 F. Supp. 2d 1226, 1239 (D. Nev. 1999).

That court further noted that there had been no indication from this Court as to whether the "essential nexus" test announced in *Nollan* and the "rough proportionality" test announced in *Dolan* should be exported beyond those cases in which the government sought the concession of property from landowners.

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[2] This Court has, however, indicated that the *Agins/Nollan* heightened scrutiny analysis is applicable outside the context of dedications and exactions. In *Yee v. City of Escondido,* this Court upheld a mobile home rent control ordinance against a physical takings challenge. In the course of that opinion, Justice O'Connor explained that the effect of the regulation "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee*, 503 U.S. at 530.

> The Supreme Court has developed a test to make this determination in its "unconstitutional exactions" cases, *Dolan v. City of Tigard* and *Nollan v. California Coastal Commission*–the "essential nexus"/"rough proportionality" test. That is, first it must be determined "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city," *Dolan*, 512 U.S. at 386 (citing *Nollan*, 483 U.S. 825, 837 (1987)), and then whether some "rough proportionality" exists between the condition exacted and the "impact of the proposed development." 512 U.S. at 390-91. ***Aside from one footnote in Dolan, these cases do not really indicate whether this test should also be applied to situations in which no concession is being sought by the government in return for the grant of a permit to a specific individual.***

Tahoe-Sierra Preservation Council, Inc., 34 F. Supp. 2d at 1239 (emphasis added).

Federal courts of appeals have also wrestled with how to apply this Court's regulatory takings jurisprudence outside the context of dedications. "This test has been restated and reapplied many times, but it is still not refined with precision." *Dodd v. Hood River County*, 136 F.3d 1219, 1228 (9th Cir. 1998). "How to determine whether a regulatory taking has occurred is the subject of ongoing debate." *Florida Rock Industries v. United States*, 18 F.3d 1560, 1564 (Fed. Cir. 1994).

This Court, however, has been its own harshest critic in recognizing the confusion that exists regarding the current state of takings jurisprudence.

> Without denigrating the importance the regulatory taking concept has assumed in our law, it is fair to

> say it has proven difficult to explain in theory and to implement in practice. Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.

Eastern Enterprises v. Apfel, 118 S. Ct. at 2155 (Kennedy, J., concurring in the judgment and dissenting in part) (citing *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 123 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979)).

Last term this Court had occasion to decide a regulatory taking case in which no concession of property was demanded by the government. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 119 S. Ct. 1624. That case required this Court to address the constitutionality of a city's numerous denials of a landowner's application to develop a parcel of land. Because the case involved a permit denial, rather than a condition, this Court ruled that the "rough proportionality" test of *Dolan* (used to measure the proper scope of permit conditions) was "inapposite." *Del Monte Dunes,* 119 S. Ct. at 1635. The Court in *Del Monte Dunes* failed, however, to specifically articulate the standard of review to be applied in cases involving permit denials.[3] As this Court explained, it has "provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions." *Del Monte Dunes,* 119 S. Ct. at 1636.

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[3] Indeed, the Court specifically declined suggestions that it revisit the heightened scrutiny requirement set out in *Agins* and *Yee*. *Del Monte Dunes*, 119 S. Ct. at 1636.

Unfortunately, as the decision below illustrates, this latest discussion of the regulatory takings doctrine has left the lower courts confused. The court below interpreted this Court's explicit refusal to revisit the standard of review as set forth in the prior decisions in *Agins* and *Nollan* as a *sub silentio* rejection of the "essential nexus" test outside the context of cases involving a dedication of land. *Bonnie Briar*, 94 N.Y.2d at 107, 699 N.Y.S.2d at 725. Commentators have noted that the opposite conclusion is logically implicit in the Court's singling out of the *Dolan* "rough proportionality" test, while making no mention of the applicability of *Nollan's* "essential nexus" test. "One could also argue, even after *Del Monte Dunes*, that it is merely *Dolan's* 'rough proportionality' test, rather than *Nollan's* heightened scrutiny generally, that is 'inapposite' outside of the exactions context." Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 Harv. J.L. & Pub. Pol'y 234, 280 n.150 (1999). *Accord*, Douglas W. Kmiec, *The "Substantially Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Exactions?*, 22 Zoning and Planning L. Rep. 97 (1999). Although this latter conclusion is consistent with the Court's decision in *Agins* and *Yee*, the decision below demonstrates that this reasoning will not be embraced by every court that is presented with the issue. By singling out *Dolan's* "rough proportionality" test, without mentioning the applicability of *Nollan's* heightened scrutiny test, commentators, and far more importantly lower courts, will certainly split on the issue of whether any degree of heightened scrutiny is to be applied in cases falling outside of the exaction and dedication context.

According to the court below, once the government is freed from the strictures of *Dolan* ***and*** *Nollan* the Fifth Amendment requires only that the regulation in question bear

a "reasonable relation" to a legitimate government interest. *Bonnie Briar*, 94 N.Y.2d at 108, 699 N.Y.S.2d at 726. As this Court explained in *Dolan*, the term "reasonable relation" bears an uncomfortable resemblance to the highly deferential (almost nonexistent) rational basis standard of review. *Dolan*, 512 U.S. at 391. The application of this standard of review is at odds with the central teaching of *Agins* and *Nollan* that the constitutionally imposed requirement that a regulation "substantially advance" a "legitimate state interest" means something different (and more) than rational basis review. *Agins*, 447 U.S. at 260; *Nollan*, 483 U.S. at 834 n.3. This Court in *Nollan* made clear that the standards to be applied in takings cases are "quite different" than the standards to be applied to due process and equal protection claims. *Id.* The confusion generated since *Nollan* has caused the court below to drop the standard of review in nondedication takings cases to the basement of constitutional analysis, making it no different than the standards which are applied in due process and equal protection claims. This reasoning is at odds with the central holding of *Nollan*.

The lower court's reading of *Del Monte Dunes* is also at odds with the purpose of the Fifth Amendment. One of the principle purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." *Agins v. City of Tiburon*, 447 U.S. at 260.

The Town of Mamaroneck has singled out Petitioner's golf course to advance such undeniably public interests as the preservation of open space, flood control, and the preservation of recreational activities. *Bonnie Briar*,

94 N.Y.2d at 104, 699 N.Y.S.2d at 723. The highly deferential "reasonable relation" standard of review employed by the court below merely rubber stamps the Town's decision to conscript Petitioner's property to achieve public goals. The absence of searching judicial review gives the government *carte blanche* to enact regulations which force some individuals alone to bear burdens which should be borne by the public as a whole, so long as those regulations do not require the dedication of real property. The standard of review adopted and applied by the lower court essentially eviscerates the central purpose of the Takings Clause and, in cases which do not require a dedication of property, relegates the Takings Clause to the status of a "poor relation" to the rest of the Bill of Rights. This Court should grant review to provide a much needed "thorough explanation" of the requirement that a regulation "substantially advance legitimate public interests outside the context of required dedications or exactions." *Del Monte Dunes*, 119 S. Ct. at 1636.

II

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS REGARDING THE PROPER LEVEL OF SCRUTINY TO BE APPLIED IN TAKINGS CASES WHERE THE GOVERNMENT DOES NOT REQUIRE A DEDICATION OR EXACTION OF LAND IN EXCHANGE FOR A PERMIT

Supreme Court Rule 10 provides that a petition for writ of certiorari may be granted in order to resolve a conflict between a state court of last resort and another state court of last resort or a United States Court of Appeals. The decision below does not create such a conflict, it merely adds to a preexisting conflict of authority among lower state and federal courts. This Court should grant the writ to resolve this

conflict on the meaning and scope of the Fifth Amendment to the United States Constitution.

The court below concluded that *Nollan's* heightened scrutiny requirement was inapplicable in a takings challenge to the Town's decision to prohibit Petitioner from building on its property. *Bonnie Briar*, 94 N.Y.2d at 107, 699 N.Y.S.2d at 725. Unfettered by *Nollan's* requirement that some causal nexus be demonstrated, the Town was free to conscript the property for recreational use and flood control based on a showing that the zoning was reasonably related to those government interests. This decision is at odds with the decisions of other courts and only serves to further muddle an already very confused area of the law.

The confusion among lower courts is illustrated by, although certainly not confined to, the conflict of authority which has developed between the Ninth Circuit Court of Appeals and California state courts. "[T]he Ninth Circuit has read *Nollan* unusually broadly, while the California courts rarely have applied *Nollan* outside of the physical exactions area." Gerry, *supra*, at 289.[4] This discrepancy between federal and state court interpretations of the Takings Clause and the application of *Nollan* is best demonstrated by a recent series of cases involving the constitutionality of rent control laws.

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[4] The author also notes that the tension between state court and federal court interpretations of *Nollan* exists between New York state courts and the Second Circuit Court of Appeals. New York state courts have applied *Nollan's* "essential nexus" test to strike down unconstitutional rent control ordinances. *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 74 N.Y.2d 92, *cert. denied*, 493 U.S. 976 (1989); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 84 N.Y.2d 385 (1994). The Second Circuit Court of Appeals, on the other hand, has been far more restrictive in its application of *Nollan*. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990).

Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997), involved a challenge to a Hawaii ordinance that regulated property on which condominium units were built. The ordinance limited the increases in ground rent that the owner of the land on which the condominiums were built could charge. *Richardson*, 124 F.3d at 1163. The ordinance required no dedication or exaction of land. Nevertheless the Ninth Circuit applied *Nollan* and found that the ordinance failed to substantially advance a legitimate government interest.

> Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. *Nollan*, 483 U.S. at 834. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable owner-occupied housing . . . . The Ordinance thus effects a regulatory taking.

Richardson, 124 F.3d at 1165-66.

The reasoning of the Ninth Circuit is at odds with the decision rendered by the court below. Whereas the Ninth Circuit has interpreted *Nollan* to apply outside the context of dedications and exactions (and, in fact, has interpreted *Nollan* to require the invalidation of a rent control ordinance), the court below has severely limited *Nollan's* reach. The Ninth Circuit's reasoning has also been, expressly, disavowed by California state courts.

The California Supreme Court has explained that *Nollan's* heightened scrutiny requirement is inapplicable in cases involving rent control or other generally applicable land use restrictions.

> [W]e believe it is clear at least that the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply in this case. Rather, the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. Thus, the party challenging rent control must show "that it constitutes an arbitrary regulation of property rights."

Santa Monica Beach, Ltd. v. Superior Court, 19 Cal. 4th 952, 967, 81 Cal. Rptr. 2d 93, 102, 968 P.2d 993, 1002, *cert. denied*, 119 S. Ct. 1804 (1999).[5]

More recently a California court of appeal explained the conflict between the California Supreme Court and the Ninth Circuit Court of Appeals. The court of appeal stated the obvious by recognizing that Ninth Circuit and California Supreme Court decisions regarding the scope and applicability of *Nollan* could not be reconciled.

> In this case, there is a good reason for not following the Ninth Circuit. The *Richardson* court used the *Agins-Nollan* test in striking down the Honolulu rent control ordinance. As we concluded

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[5] The California Supreme Court was not unanimous in this interpretation of the Fifth Amendment. As Justice Brown explained in dissent:

> The majority's call to deference thus rests on an unspoken and critical assumption: that property merits only an inferior level of protection. That conclusion, a historical artifact of the demise of the *Lochner* era, has no defensible constitutional provenance.

Santa Monica Beach, 19 Cal. 4th at 1026, 81 Cal. Rptr. 2d at 141, 968 P.2d at 1041 (Brown, J., dissenting).

> above, this test cannot be used to review constitutionality of rent control schemes applicable to mobilehome parks. Moreover, our Supreme Court expressly held that this test cannot be used to review the constitutionality of general rent control laws.

Montclair Parkowners Association v. City of Montclair, 76 Cal. App. 4th 784, 795, 90 Cal. Rptr. 2d 598, 605-06 (1999).

As it currently stands, the meaning and scope of the Fifth Amendment in California depends entirely upon whether a Takings Clause challenge is brought in state or federal court. Unfortunately, this situation is not unique to California. Absent guidance from this Court, lower courts will continue to struggle to define the reach and proper application of *Nollan's* essential nexus test. The court below concluded that the explicit repudiation of the "rough proportionality" test in *Del Monte Dunes* also constituted a *sub silentio* rejection of *Nollan's* essential nexus test outside the context of dedications or exactions. This cloistered view of *Nollan* is doctrinally consistent with the position taken by California state courts and at odds with the jurisprudence of the Ninth Circuit Court of Appeals. Moreover, this interpretation is at odds with the rationale of *Nollan* that the "substantial advancement" prong of *Agins* requires something more than rational basis review. This Court should grant the writ in order to resolve this conflict.

CONCLUSION

The decision below is but the latest in a long line of lower court decisions struggling to apply the regulatory takings doctrine outside of the context of dedications and exactions. Last term this Court held that *Dolan's* "rough proportionality" inquiry did not apply beyond the special context of exactions. This decision, however, left unanswered the question of whether *Nollan's* essential nexus analysis

applied to cases, such as the one at bar, where the challenge is not to a demanded dedication or exaction, but to the denial of the ability to develop property. The court below held that the "essential nexus" test was not applicable to this situation. In so holding, the court below added to the already large body of conflicting state and federal court decisions attempting to define the scope and reach of "essential nexus" test. This Court should grant the writ to clarify this important question of constitutional law and to resolve the conflict of authority among the lower courts.

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Respectfully submitted,

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